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NO. 84-724

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS A&M UNIVERSITY, et al.,
*Appellants,*

v.

GAY STUDENT SERVICES, et al.,
*Appellees.*

**On Appeal From The United States Court Of Appeals For The Fifth Circuit**

## MOTION TO DISMISS OR AFFIRM

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# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CASES AND AUTHORITIES | II-III |
| PRELIMINARY STATEMENT | 1-2 |
| STATEMENT OF THE FACTS | 2-5 |
| ARGUMENT | 6 |
| I. THIS APPEAL SHOULD BE DISMISSED | 6-16 |
| A. *Appellants are Not Entitled to Appeal as of Right* | 6-8 |
| B. *This Case is Inappropriate for Discretionary Review by Writ of Certiorari* | 8-16 |
| II. IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE AFFIRMED | 16-20 |
| A. *The Decision Below is Correct on the Law and the Fifth Circuit Correctly Found that TAMU's Denial of Recognition Abridged the First Amendment Rights of GSS* | 17-18 |
| B. *The Decision Below is Correct on the Facts and the Fifth Circuit Correctly Adjudicated the Insufficiency of the Purported State Interests* | 18-20 |
| CONCLUSION | 20 |
| CERTIFICATE OF SERVICE | 21 |

# TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| *Associated Students of Sacramento State College v. Butz*, Civ. No. 200795 (Cal. Super. Ct., Sacramento, Feb. 15, 1971) | 10 |
| *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tex. 1982) appeal dismissed _____F.2d_____ (5th Cir. Sept. 21, 1984) | 13 |
| *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, 52 S.Ct. 118, 76 L.Ed. 254 (1931) | 8 |
| *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) | 15 |
| *Dayton Bd. of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 270 (1979) | 15 |
| *De Marco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974) | 16 |
| *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) | 10 |
| *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) | 15 |
| *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970) | 6 |
| *Gay Activists Alliance v. Bd. of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981) | 10 |
| *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) | 9, 11 |
| *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom. Ratchford v. Gay Lib*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978), *reh'g denied*, 435 U.S. 981, 98 S.Ct. 1632, 56 L.Ed.2d 74 (1978) | 9, 17, 19 |
| *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974) | 9, 10, 11 |
| *Guidry v. Texaco, Inc.*, 430 F.2d 781 (5th Cir. 1970) | 15 |
| *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934) | 7, 8 |
| *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) | 12, 19 |
| *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 834 (1967) | 15 |
| *New York v. Uplinger*, 58 N.Y.2d 936 (1983), *cert. dismissed as improvidently granted*, _____U.S._____, 104 S.Ct. 2332 (1984) | 14 |
| *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 43, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) | 6 |

CASES


| | Page |
|---|---|
| *Pickering v. City of Buffalo, New York*, ____U.S.____, 104 S.Ct. 2672 (1984) | 8 |
| *Pointon v. Donovan*, ____U.S.____, 104 S.Ct. 1902 (1984) | 8 |
| *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) | 15, 16 |
| *Rettig v. Kent City School Dist.*, ____U.S.____, 104 S.Ct. 2379 (1984) | 8 |
| *Student Coalition for Gay Rights v. Austin Peavy State University*, 477 F.Supp. 1267 (M.D. Tenn. 1979) | 10 |
| *Texas A&M University v. Gay Student Services*, 612 F.2d 160, (vacating lower court dismissal) *reh'g denied*, 620 F.2d 300 (5th Cir. 1980), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980), 737 F.2d 1317 (5th Cir. 1984) (reversing judgment of district court) | 1, 7, 14 |
| *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) | 12, 19 |
| *Town of Ball v. Rapids Parrish Policy Jury*, ____F.2d ____ (Slip Op. 870 n.1, 5th Cir. Nov. 19, 1984) | 13 |
| *University of New Hampshire v. April*, 115 N.H. 576, 347 A.2d 446 (N.H. 1975) | 10 |
| *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1981) | 12 |
| *Wood v. Davidson*, 351 F.Supp. 543 (N.D. Ga. 1972) | 10 |


STATUTES


| | |
|---|---|
| 28 U.S.C. § 1254(2) | 6, 8 |
| 28 U.S.C. § 2103 | 16 |


SUPREME COURT RULES


| | |
|---|---|
| Supreme Court Rule 16.1(a) | 8 |
| Supreme Court Rule 17.1 | 8, 11, 16 |


FEDERAL RULES OF CIVIL PROCEDURE


| | |
|---|---|
| FRCP 52 | 18 |

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OCTOBER TERM, 1984

TEXAS A&M UNIVERSITY, et al.,
*Appellants,*

v.

GAY STUDENT SERVICES, et al.,
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**On Appeal From The United States Court Of Appeals For The Fifth Circuit**

## MOTION TO DISMISS OR AFFIRM

## PRELIMINARY STATEMENT

Appellees hereby move, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal or, in the alternative, to affirm the unanimous decision in *Gay Student Services v. Texas A&M University,* 737 F.2d 1317 (5th Cir. 1984). This Court should decline to review the decision below because this appeal is not within this Court's jurisdiction,

and because the issues presented by the decision of the court below do not warrant further argument.

## STATEMENT OF THE FACTS

Appellant Texas A&M University ("TAMU") brings this appeal to challenge a unanimous decision of the United States Court of Appeals for the Fifth Circuit. That decision held that appellee Gay Student Services ("GSS") and its individual members have a First Amendment right to speak and associate on the TAMU campus and that TAMU impermissibly withheld official recognition of the student group in violation of that right.[1]

On April 4, 1976, several representatives of GSS met with Dr. John Koldus, TAMU's Vice President for Student Affairs, and asked for permission to use University facilities to hold meetings, to use campus bulletin boards to post notices and literature, and to have access to the student newspaper and radio. Dr. Koldus informed the students that these privileges were extended only to student groups that had received formal recognition from the University.

The students then counseled with Carolyn Adair, Director of Student Affairs, as to the proper form and content of the application necessary to become a recognized student organization. They were advised to apply as a service organization rather than as a social or political organization because there would be fewer problems. The advice prompted them to leave out any goals or purposes that were not strictly service oriented. On

1. Because the Fifth Circuit decision was based entirely on the First Amendment, that court did not reach the due process and equal protection claims asserted by GSS, 737 F.2d at 1334 n.29.

April 5, 1976, Gay Student Services formally applied for recognition.

The application setting out the goals and purposes read as follows:

(1) To provide a referral service for students desiring professional counseling including psychological, religious, medical and legal fields.

(2) To provide to the TAMU community information concerning the structures and realities of gay life.

(3) To provide speakers to classes and organizations who wish to know more about gay lifestyles.

(4) To provide a forum for the interchange of ideas and constructive solutions to gay people's problems.

The application was not submitted to the Student Organization Board, which was the normal process, but taken directly to Dr. Koldus for action. The students met several times with Dr. Koldus with respect to the status of their application over the next eight months. On November 29, 1976, Dr. Koldus wrote a letter denying formal recognition to GSS, stating that its purposes and goals were not consistent with the philosophy and goals that have been developed for the creation and existence of Texas A&M University; that homosexual conduct is illegal in Texas and, therefore, it would be most inappropriate for a state institution officially to support a student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas. Further, he stated that the University administrative staff and faculty were responsible for providing referral services, educational in-

formation, appropriate speakers for classes and a forum for the interchange of ideas and that student organizations do not have the educational experience, the responsibility, nor the authority to educate the larger public.

A few key facts are emphasized here for the convenience of the Court. First, the decision to deny official recognition to GSS was made by one man: Dr. John Koldus. Although he consulted with the President of the University and the University legal staff, he ultimately assumed personal responsibility for the administrative decision that "the stated purposes and goals of the 'Gay Student Services' are not 'consistent with the philosophy and goals that have been developed for the creation and existence of Texas A&M University'." 737 F.2d at 1321 n.4; *see* Jurisdictional Statement at 6.

Second, TAMU's appeal is predicated largely on the mistaken belief that mere official recognition of a student service organization that has been meeting unofficially since 1976, will cause a significant increase in homosexual activity. This belief is completely unfounded. Although evidence adduced at trial proved that "80% of research and Ph.D—granting universities in the United States have homosexual student organizations on their campus," [sic], III Transcript at 30, no evidence was introduced to show that official recognition of any of these groups had ever led to increased homosexual activity. To the contrary, plaintiffs' experts, both of whom had actually worked with gay student groups, testified that students did not come to group meetings "to pick up other people," III Transcript at 14, and that the effects of such groups "on overall patterns of sexual behavior, per se, would be extremely minimal or marginal." II Transcript at 17.

The only witness who testified that official recognition of GSS might lead to increased homosexual activity was TAMU's witness, Dr. Paul Cameron.[2] Cameron conceded that he had never studied the activities of university gay student groups and that he knew of no one who had. III Transcript at 145-46. Moreover, the evidence at trial showed that the sole study Cameron has published on homosexuality—which he admitted appeared in "an obscure journal," IV Transcript at 28—has been deemed "incredibly poor," III Transcript at 34, "not . . . scientific research," III Transcript at 21, based on "woefully inadequate" procedures, III Transcript at 23, and "not acceptable scholarship." III Transcript at 26.[3]

There is thus no reasonable basis in the record for the conclusion that official recognition of GSS would cause increased homosexual activity.

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2. TAMU offered two experts. The trial court specifically found credible the testimony concerning venereal disease offered by Dr. Charles Webb, an expert in public health. Finding of Fact No. 4, n. 1. Dr. Webb did not testify that official recognition of GSS would lead to increased homosexual conduct, such testimony as there was in this regard was offered only by Dr. Cameron. No finding of credibility was made in favor of Dr. Cameron and, indeed, the lack of such a finding is quite conspicuous.

3. Cameron's anti-gay bias has also been condemned by his profession. In December 1983, he was expelled from the American Psychological Association after a two-year investigation by its Ethics Board. Lincoln (Nebraska) Journal, October 3, 1984. In October, 1984, the Nebraska Psychological Association issued the following statement:

> The Nebraska Psychological Association formally disassociates itself from the representations and interpretations of scientific literature offered by Dr. Paul Cameron in his writing and public statements on sexuality.

Gay Community News (Boston), November 24, 1984, at 1, col. 1.

## ARGUMENT

### I. THIS APPEAL SHOULD BE DISMISSED

#### A. Appellants are Not Entitled to Appeal as of Right

Instead of seeking discretionary review of the decision below by petition for a writ of certiorari, appellants seek compulsory review by appeal pursuant to 28 U.S.C. § 1254(2). Jurisdictional Statement at 3. That statute provides that a decision of a federal court of appeals may be brought to this Court for review:

> By appeal by *a party relying on a State statute held by a court of appeals to be invalid* as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

28 U.S.C. § 1254(2) (emphasis supplied). This Court has repeatedly stated that § 1254(2) is to be strictly construed. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 43, 103 S.Ct. 948, 953, 74 L.Ed.2d 794 (1983) (dismissing appeal for want of jurisdiction where no state statute or other legislative action was invalidated); *see also Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1, 91 S.Ct. 156, 157 n.1, 27 L.Ed.2d 174 (1970) (dismissing improper appeal because statute of Puerto Rico was not a "State statute" under § 1254(2)).

No state statute within the meaning of § 1254(2) is involved in the instant case. The Court of Appeals only invalidated the administrative decision of Dr. John Koldus,

TAMU's Vice President for Student Affairs, denying official recognition to GSS. In fact, the Fifth Circuit explicitly found that Koldus' decision was based on his own interpretation of "the philosophy and goals" of TAMU, rather than on any statute enacted by the Texas legislature prohibiting gay and lesbian students from meeting together. *Texas A&M v. Gay Student Services,* 737 F.2d at 1320-21 n.4.

Appellants incorrectly attempt to analogize this case to *Hamilton v. Regents of the University of California,* 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934). In *Hamilton,* state university students challenged the validity of a compulsory military science and tactics course that had been created pursuant to a California statute that provided in part:

> all able-bodied male students of the University, whether pursuing full or partial courses in any college, or as students at large, shall receive instruction and discipline in military tactics in such manner and to such extent as the Regents shall prescribe, the requisite arms for which shall be furnished by the State. . . .

293 U.S. at 255; 55 S.Ct. at 201. This statutory requirement was implemented in an order promulgated by the California Board of Regents.

On appeal, the university argued that the Court lacked jurisdiction because the Regents' order was not a state statute. This Court rejected that argument and held that the Regents' order was reviewable on appeal because it was both "legislative in character" and sanctioned by actual authorizing legislation.

The instant case differs from *Hamilton* in two significant respects. First, the statute here in question, 28 U.S.C. § 1254(2) is to be strictly construed, unlike the jurisdictional statute governing appeals from state courts considered in *Hamilton*. Second, the decision challenged here was made by a single school administrator and is distinguishable from an order formally adopted by the Board of Regents pursuant to a statutory mandate. Thus, there is no basis to conclude that the instant case involves any legislative act or official action by any lawmaking body.

The Rules of this Court provide for dismissal of appeals that are not within the Court's jurisdiction or that are not taken in conformity with statute. Sup. Ct. R. 16.1 (a). *See also Pickering v. City of Buffalo, New York*, ____U.S.____, 104 S.Ct. 2672 (1984); *Rettig v. Kent City School District*, ____U.S.____, 104 S.Ct. 2379 (1984). *Pointon v. Donovan*, ____U.S.____, 104 S.Ct. 1902 (1984). Because the appeal presented here was improvidently taken and is not within the Court's mandatory appellate jurisdiction, it should be dismissed.

## B. This Case is Inappropriate for Discretionary Review by Writ of Certiorari[4]

Supreme Court Rule 17.1 provides that:

> *A review on writ of certiorari is not a matter or right,* but of judicial discretion, *and will be granted only*

4. Although the jurisdictional statute invoked by appellants expressly provides that when an appeal is taken under its provisions "such appeal shall preclude review by writ of certiorari at the instance of such appellant . . . ," 28 U.S.C. § 1254(2), this Court has held that a writ of certiorari may be granted if the appeal is taken improvidently. *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221; 52 S.Ct. 118 (1931).

*when there are special and important reasons therefor.* The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) *When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;* or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * * *
>
> (c) When a state court or a federal court of appeals has decided *an important question of federal law* which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. (Emphasis supplied.)

Consideration of each of these factors reveals that there are no "special and important reasons" to grant a writ of certiorari in this case.

There is absolutely no conflict between the decision of the court below and those of other courts. Every court that has considered the issue presented by the instant case has reached the same conclusion as that made by the Fifth Circuit: that gay student groups, have a protected right to equal access to forums provided by state operated universities. *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978); *Gay Alliance of Students v. Matthews,* 544 F.2d 162 (4th Cir. 1976); *Gay Students Organization of the University of New Hampshire v. Bonner,* 509 F.2d 652 (1st

Cir. 1974); *Student Coalition for Gay Rights v. Austin Peavy State University,* 477 F.Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davidson,* 351 F.Supp. 543 (N.D. Ga. 1972). *See also Gay Activists Alliance v. Bd. of Regents of the University of Oklahoma,* 638 P.2d 1116 (Okla. 1981); *University of New Hampshire v. April,* 115 N.H. 576, 347 A.2d 446 (N.H. 1975); *Associated Students of Sacramento State College v. Butz,* Civ. No. 200795 (Cal. Super. Ct., Sacramento, Feb. 15, 1971).[5]

Appellants' attempt to conjure up a "conflict between the circuits," Jurisdictional Statement at 13-15, is completely misguided. Appellants contend that the Fifth Circuit's opinion conflicts with the D.C. Circuit's decision in *Dronenburg v. Zech,* 741 F.2d 1388 (D.C. Cir. 1984), upholding a military discharge based on homosexual conduct. *Dronenburg* unquestionably is distinguishable from the instant case because it involved the determination of whether the military could terminate an individual who engaged in homosexual conduct[6] and because no First Amendment claims were presented in that case. The court in *Dronenburg* focused on the constitutional right to privacy, a right that is not asserted here. Because *Dronenburg* is not even remotely similar to the instant case, it certainly does not present any conflict with the Fifth Circuit's ruling, nor with those of the other federal courts which have upheld the First Amendment rights of gay students.

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5. The Fifth Circuit examined many of these cases in considerable detail before reaching its conclusion in the cause *sub judice,* 737 F.2d at 1328-30.

6. Appellees do not seek recognition to engage in homosexual conduct. They merely wish "to post notices on school bulletin boards, meet on campus, and have access to the student newspaper and radio." 737 F.2d at 1319.

The other cases cited by appellants in support of the asserted "conflict," *Gay Students Organization v. Bonner,* 509 F.2d 652 (1st Cir. 1974) and *Gay Alliance of Students v. Matthews,* 544 F.2d 162 (4th Cir. 1976), *see* Jurisdictional Statement at 14-15, are in complete accord with the Fifth Circuit decision. Both of these cases hold that gay student groups have the same First Amendment rights to meet on campus as other student groups. Appellants inaccurately rely on dicta in those cases suggesting that a university might have some authority to "regulate overt sexual behavior" or "actual homosexual conduct." As noted herein, the instant case does not present the question of a university's power to promulgate reasonable time, place and manner restrictions on speech nor to regulate illegal conduct occurring on campus. The Fifth Circuit simply held, in conformance with the rulings of the other Circuits, that TAMU could not totally in violation of the First Amendment deny recognition to GSS the basis that such recognition *"probably* would lead to violation of the state statute prohibiting homosexual activity." (Emphasis supplied.) Jurisdictional Statement at p. 10.

Since appellants are unable to point to a single instance in which the Fifth Circuit analysis diverges from prevailing authority, they have failed to demonstrate a "conflict between the circuits" that would justify a grant of certiorari.

Appellants have also not raised "an important question of federal law" which might weigh in favor of discretionary review under Supreme Court Rule 17.1. In their Jurisdictional Statement, appellants present the following three questions:

a) Does the First Amendment protect the rights of student groups to speak and associate on the university campus?

b) Do statutes criminalizing sodomy or evidence of psychological and medical problems associated with homosexuality constitute compelling state interests that would justify an infringement of First Amendment rights?

c) Must a U.S. Court of Appeals, considering a case for the second time, remand for further findings when it has before it a fully developed factual record and a fundamental right has been violated?

None of these questions warrant granting a writ of certiorari.

The first question warrants little discussion. The First Amendment repeatedly has been held to protect the speech and associational rights of students. *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Healy v. James,* 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *see Tinker v. Des Moines Independent School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). As this Court unanimously held in *Healy*:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. . . . Moreover, the organization's ability to participate in the intellectual give

> and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

408 U.S. at 181-82, 92 S.Ct. at 2346 (footnote omitted). There can be no doubt therefore that GSS is entitled to protection under the First Amendment.

The second question, whether infringement of this right is justified by the state's interests in regulating sexual conduct is not appropriately presented by this case. In the cause *sub judice* the Fifth Circuit merely held that no state interests shown at trial were sufficiently compelling to justify the infringement of the First Amendment rights of GSS. The court further noted that there was no evidence that any illegal conduct had taken place as a result of GSS' activity nor was it devoted to carrying out illegal activity, 737 F.2d at 1328. Moreover, the Texas Penal Code Provisions criminalizing consensual sodomy have been held invalid by the courts.[7] Thus, any asserted state interest in regulating sexual conduct simply is not at issue in this case.

Appellants also suggest that Texas has an interest in protecting the health of university students which supports non-recognition of GSS. The Fifth Circuit expressly

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7. In *Baker v. Wade,* 553 F.Supp. 1121 (N.D. Tex. 1982) the Court struck down the Texas Homosexual Conduct Statute, Texas Penal Code Section 21.06. The State of Texas has made a deliberate choice not to appeal that decision. *Baker v. Wade,* 743 F.2d 236 (5th Cir. 1984). Since TAMU is not a creation of the State it has no standing to oppose the will of its creator by attempting to collaterally appeal the *Baker* decision here. *Town of Ball v. Rapids Parrish Policy Jury,* ____F.2d____ (Slip Op. 870 n.1 (5th Cir.) Nov. 19, 1984).

rejected this argument and there is no reason for this Court to overturn that determination.[8] Moreover, this issue does not present any major constitutional question for this Court to consider.

Although these state interests are allegedly compelling, the Attorney General of Texas has declined to participate in this appeal. This Court recently stated that "we consider highly relevant the views of the State's chief law enforcement official." *New York v. Uplinger,* ____ U.S. at ____ n.1, 104 S.Ct. at 2333 n.1. Thus, this Court should not grant appellants' application for review.

The third question raised by appellants, whether the law requires a remand to the trial court for further findings as to the asserted state interests, is already settled.[9] Indeed, the Fifth Circuit considered such a course and rejected it for reasons stated explicitly in its opinion.

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8. The trial court also recognized that these considerations did not influence TAMU's underlying administrative decision to deny recognition to GSS:

> While the compelling need for . . . Texas A&M University, to discourage this public health risk *might* be a sufficient basis for denial of recognition of Gay Student Services, *the University did not offer this reason as a basis for Koldus' decision in 1976,* and the Court does not rely on this evidence as a basis for its decision.

Findings of Fact and Conclusions of Law n.1 (Jurisdictional Statement at B-3) (emphasis added). *See also TAMU v. GSS,* 737 F.2d at 1330. It is also significant to note that the American Public Health Association filed an *amicus curiae* brief with the Fifth Circuit in support of recognition of GSS. The APHA asserts that "[A] legitimate interest in public health does not justify this mistreatment of Gay Student Services which occurred at Texas A&M." Brief Amicus Curiae of the American Public Health Assn. at p. 29.

9. This appeal does not present the question whether an appellate court should remand for the entry of appropriate relief in accordance with its opinion, for this is precisely what the Fifth Circuit did. 737 F.2d at 1334.

> Faced with a fully developed record upon which the trial court deliberately chose not to rule, an eight year old case before us for the second time, and a long overdue request for injunctive relief from violation of a fundamental constitutional right, we decline the opportunity of a second remand.

737 F.2d at 1328 n.17. Appellate courts, including this one, often have declined to remand cases for findings of fact where judicial economy would not be served thereby. *Dayton Bd. of Education v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 270 (1979) (where litigation over discrimination in schools had a protracted history, including a previous decision by this Court, circuit court decision was affirmed despite new findings of fact made on appeal rather than remand); *First National Bank of Boston v. Belotti,* 435 U.S. 765, 786-87, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978) (where court below found no First Amendment right requiring examination of state interests, this Court reversed and conducted its own review of state interests); *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (this Court declined to remand where all relevant issues were presented to the district court); *Levin v. Mississippi River Fuel Corp.,* 386 U.S. 162, 170, 87 S.Ct. 927, 932, 17 L.Ed.2d 834 (1967) ("Indeed, this point is so clear that we see no occasion for remanding the issue. . . . Effective judicial administration requires that we dispose of the matter here."); *Guidry v. Texaco, Inc.,* 430 F.2d 781, 784 (5th Cir. 1970) (failure of district court to make all possible findings does not require remand).

Cases cited by the appellants do not require a contrary result. Jurisdictional Statement at 16. *Pullman-Standard v. Swint,* 456 U.S. 273, 291, 102 S.Ct. 1781, 72 L.Ed.2d

66 (1982) states simply that remand is the "usual" course followed, not that it is required by law. Moreover, this Court in *Pullman* further stated that: "[A] remand is the proper course *unless the record permits only one resolution of the factual issue.*" 456 U.S. at 292 (emphasis supplied). The Fifth Circuit, after reviewing the record, made precisely such a finding below. 737 F.2d at 1330.[10] Because appellants have cited no authority for the proposition that remand was required, there is no reason for this Court to review the question.

The decision below presents neither a conflict between the circuits, nor an important question of federal law that should be decided by this Court. Nor does it fall within any of the other factors to be considered by this Court on petition for a writ of certiorari under Supreme Court Rule 17.1. There appears to be no reasonable ground for granting a petition for a writ of certiorari. This Court should dismiss the instant appeal and assess damages and costs to appellees pursuant to 28 U.S.C. § 2103.

## II. IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE AFFIRMED

Supreme Court Rule 16 governs motions to dismiss appeals in this Court, providing in pertinent part, "Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. . . ." Pursuant to this rule, appellees move to affirm the decision below.

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10. *De Marco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974), cited by appellants, also is inapplicable. *De Marco* dealt with the power of an appellate court to examine new evidence, introduced for the first time on appeal. Thus, it is completely irrelevant to this case, where "during trial, the District Court permitted full development of [TAMU's] asserted compelling state interests." 737 F.2d at 1328, n.17.

### A. The Decision Below is Correct on the Law and the Fifth Circuit Correctly Found that TAMU's Denial of Recognition Abridged the First Amendment Rights of GSS

In its opinion, the Fifth Circuit panel accurately analyzed and discussed the application of all the leading precedents on the First Amendment rights of college students. 737 F.2d at 1324-27 and 1331-33. Indeed, appellants do not suggest in their Jurisdictional Statement that the panel misconstrued controlling precedents.

The unanimous panel of the Fifth Circuit, in a cogent and well-reasoned opinion explained why the district court's finding that "Texas A&M University's refusal to extend official recognition was not based upon the content of Gay Student Services' ideas about homosexuality, since the group is not trying to convey any message about homosexuality . . ." was clearly erroneous. The Fifth Circuit looked to GSS's own statement of goals and purposes, as other appellate courts have done, *see Gay Lib v. University of Missouri,* 558 F.2d at 854, and to TAMU's asserted reasons for denial. 737 F.2d at 1320-21 n.4. It also looked to minutes of the TAMU Board of Regents, *id.* at 1322, and to other evidence presented at trial to explain TAMU's denial of recognition. *Id.* at 1322-24. Finally, it looked at the factual setting of the litigation.

> At a very minimum, GSS's quest for recognition, coupled with its desire to publicize its meetings and activities—indeed the very filing of this lawsuit—is clearly a "message" that its members reject society's traditional expectations that they associate furtively and in fear that their homosexuality will be detected.

*Id.* at 1323 n.9. After examining all of the facts underlying the trial court's finding, the panel concluded:

> For all the foregoing reasons, we conclude that the District Court's factual findings with regard to the nature of GSS were clearly erroneous. We think it clear from the facts that TAMU refused officially to recognize GSS based upon the homosexual content of the group's ideas—which it sought to convey through implementing its stated goals and purposes.

*Id.* at 1324. Thus, the court was aware of the standard of review required by Fed. R. Civ. P. 52, and applied it accordingly.

### B. The Decision Below is Correct on the Facts and the Fifth Circuit Correctly Adjudicated The Insufficiency of the Purported State Interests

Although the trial court expressly declined to do so, Findings of Fact 4 n.1, the Fifth Circuit panel reviewed the evidence adduced at trial which purported to show some important state interest served by the denial of recognition to GSS. The panel expressly found that no significant state interest was served by the denial of recognition.

Both of the state interests urged on this appeal—preempting anticipated violations of the now-invalidated Penal Code and protecting the public health—were fully considered and rejected by the panel.

> As to TAMU's asserted interest in preventing expression likely to "incite, promote, and result" in then-illegal homosexual activity, we emphasize that while Texas law may prohibit certain homosexual practices, no Texas law makes it a crime to be a

> homosexual. Furthermore, there is no evidence that any illegal activity has taken place as a result of GSS's existence in the past, nor is there any evidence that GSS is an organization devoted to advocacy and incitement of imminent illegal, specifically proscribed homosexual activity. Consistent with *Healy*, we cannot conclude that the "critical line . . . between advocacy and action" has been violated in this case.

737 F.2d at 1328. The panel went on to observe that the other courts that have passed on this question have reached the same conclusion. *Id.* at 1328-29.

The panel also examined the purported health interests at stake:

> This asserted justification [for infringing plaintiffs' rights] must fail for the same reasons the others did: TAMU has simply not proven that recognition will indeed imminently result in such dire consequences. The speculative evidence offered by the defendants' experts "for which no historical or empirical basis is disclosed," cannot justify TAMU's content-based refusal to recognize GSS. *Gay Lib, supra,* 558 F.2d at 854. We think that on this record TAMU's public health argument is precisely the kind of "undifferentiated fear or apprehension" that the Supreme Court has repeatedly held "is not enough to overcome the right to freedom of expression." *Tinker, supra,* 393 U.S. at 508, 89 S.Ct. at 737; *Healy, supra,* 408 U.S. at 191, 92 S.Ct. at 2351.

*Id.* at 1330. Thus, the panel found that the asserted state interests were insufficient to justify the denial of official recognition.

Appellants' Jurisdictional Statement suggests no persuasive reason as to why these findings merit review. Accordingly, the decision of the Fifth Circuit should be affirmed.

## CONCLUSION

For all these reasons, the appeal should be dismissed in its entirety and appellees should be awarded damages and costs. In the alternative, this Court should affirm the decision below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been furnished to all counsel of record listed below by placing the same in the United States mail, certified, return receipt requested, this _____ day of December, 1984, in accordance with Sup. Ct. R. 28.

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